Supreme Court, U.S.
FILED
JUL 31 1991
OFFICE OF THE CLERK

(2)

No. 90-1855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT PRICE, *et al.*,
Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; AND MARINE DRAFTSMEN ASSOCIATION, LOCAL 571, UAW, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATUTES INVOLVED

In addition to the statutes cited in the petition for *certiorari*, Pet. 2, § 14(b) of the National Labor Relations Act, as amended, was relied upon by the courts below in deciding the first question presented by the petition. That statute provides:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements re-

quiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law. [29 U.S.C. § 164(b).]

STATEMENT OF THE CASE

1. The collective bargaining agreement between the Electric Boat Division of General Dynamics Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers and UAW Local 571 (hereafter "Union" or "UAW") requires all bargaining unit employees, as a condition of employment, to pay an amount equal to the initiation fees and dues required of Union members. Pet. App. 2a-3a. Prior to 1988, General Dynamics and the UAW required all bargaining unit employees to pay a uniform agency fee equal to normal Union dues, regardless of whether the employees were Union members and regardless of whether they objected to paying that amount. The petitioners filed this action, "contend[ing] that the payment of the full amount of dues and fees violated their First Amendment speech and associational rights and their Fifth Amendment due process rights, and, in addition, constituted a breach of the Union's duty of fair representation." Pet. App. 3a.

The district court (Blumenfeld, J.) initially dismissed the petitioners' constitutional claims on the grounds that General Dynamics and the UAW are not state actors subject to First and Fifth Amendment constraints. Pet. App. 3a. The district court also dismissed the petitioners' fair representation claims on the grounds that their dispute with the UAW involved internal union matters and thus did not implicate the duty of fair representation. Pet. App. 3a-4a. The Second Circuit (Cardamone, Pratt, & Miner, JJ.) affirmed the district court's rulings. *Price v. International Union, U.A.W.*, 795 F.2d 1128 (2d Cir. 1986), *vacated*, 487 U.S. 1229 (1988).

2. In *Communications Workers v. Beck*, 487 U.S. 735 (1988), this Court held that objecting nonmembers, who pay fees under an agency shop agreement, state a statutory claim for breach of the duty of fair representation by alleging that their union representative "expend[s] funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment. . . ." *Id.* at 738. The Court thereupon vacated the decisions in this case, and remanded for further consideration in light of the *Beck* decision. *Price v. International Union, U.A.W.*, 487 U.S. 1229 (1988).

Shortly after this Court's decision in *Beck*, the UAW adopted procedures to reduce the amount of agency fees charged to objecting nonmembers. Pet. App. 29a-33a. While the district court held on remand that the Union's pre-Beck application of its agency shop agreement breached the duty of fair representation, Pet. App. 37a, the parties thereafter settled all claims arising on or before June 30, 1988 and stipulated to the dismissal of those claims. Dist. Ct. Docket Nr. 104. Thus, the proceedings at issue here focussed entirely on the adequacy of the objection procedures adopted by the UAW after this Court's decision in *Beck*. *See* Pet. App. 5a n. 1.

On remand, the district court (Dorsey, J.), Pet. App. 19a-20a, and the court of appeals (Oakes, Cardamone & Sprizzo, JJ), *id.* at 6a-7a, again dismissed the petitioners' constitutional claims for want of state action. In this regard, the courts below relied upon the analysis in the first court of appeals decision in this case. *Price v. International Union, U.A.W., supra*, 795 F.2d at 1132-1133.

The courts below also concluded that the "Plaintiffs' claims of unfair representation cannot presently be sustained." Pet. App. 22a. The lower courts based this conclusion on their finding that "[s]ince *Beck*, the Union has not acted arbitrarily, discriminatorily or in bad faith." Pet. App. 22a. *See also id.* at 8a. As the district

court noted, "the Union has determined, at least preliminarily, the percentage of costs attributable to collective bargaining activities (85.4%) and adjusted plaintiffs' assessed fees accordingly." Pet. App. 22a. In addition, "[t]he Union has also placed a sum representing the entire projected 85.4% reduced payments of all non-Union plaintiffs for the twelve-month period following *Beck* in an interest bearing escrow account." *Id.* And, if the plaintiffs invoke arbitration, "[t]hese monies will not be used by the Union until an independent arbitrator has reviewed the Union's percentage determination." *Id.*

ARGUMENT

The petitioners argue that the courts below erred in two respects: first, by holding that constitutional challenges to the negotiation or administration of a union security clause in a collective bargaining agreement between a private company and a private labor organization governed by the National Labor Relations Act "fail for a want of government action," Pet. App. 6a; and second, by holding that the procedure covering objections to the payment of agency fees adopted by the UAW in response to this Court's decision in *Beck* in fact meets the three criteria governing their fair representation claim asserted by the petitioners themselves, Pet. 17-18.

The first of these rulings—which faithfully follows the state action law stated by this Court in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)—is plainly correct. The second ruling is equally correct, and, moreover, represents the resolution of the kind of fact-specific controversy that is the domain of the lower federal courts. The *certiorari* petition should therefore be denied.

1 (a). In ruling on the petitioners' First Amendment claim, the courts below applied the two part state action test set out in *Lugar v. Edmondson Oil Co., supra*, 457 U.S. at 937. Pet. App. 6a-7a & n. 3, 19a-21a & ns. 6-7;

795 F.2d at 1130-33. The court of appeals described the *Lugar* test as follows:

> [S]tate action requires that: (1) the deprivation must be caused by the exercise of some right or privilege created by the state; and (2) the party charged with the deprivation must be a state actor. [Pet. App. 6a n. 3.]

The petitioner's First Amendment claims fail the first prong of this test, because, as the court of appeals explained in its first opinion, "[b]y authorizing the inclusion of union shop clauses subject to the whim of the states, the NLRA allows private parties to do nothing more than what they could have agreed to do without the NLRA." 795 F.2d at 1133. And their constitutional claims fail the second prong as well, since "neither the employer nor the union here can be said to be a state actor." *Id.*[1]

(b) The *certiorari* petition cannot—and, indeed, does not even attempt to—take issue with either the invocation or the application of *Lugar*'s two-part test by the courts below. As this Court has recently reaffirmed, *Lugar* sets forth the basic "framework for state action analysis. . . ." *Edmondson v. Leesville Concrete Co.*, —— U.S. ——, 59 L.W. 4574, 4576 (June 3, 1991). Instead, the petitioners argue that this general "framework for state action analysis" is made irrelevant to the decision

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[1] The court of appeals summarized its state action analysis as follows:

> Thus, in enacting the NLRA congress mapped out the background and parameters of possible private action, but required nothing with respect to the particular wrong complained of here. When a private party makes the ultimate choice within a range of options offered by the government, state action generally is not implicated. Since the union security clause was a product of private negotiations and was not attributable to the government, [petitioners'] constitutional challenges were properly dismissed for lack of government action. [795 F.2d at 1133 (citation omitted).]

of the instant case by *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956). Pet. 12-15. The petitioners are clearly wrong on this score; *Hanson*'s rationale makes it plain that its state action holding has no application to cases arising under the *National Labor Relations Act*.

In *Hanson*, state action was found in the Congress's "enactment" of the *Railway Labor Act* amendments authorizing union shop agreements on the railroads even in the face of contrary state law. 352 U.S. at 232. As the opinions below explain, "the finding of state action under Section 2, Eleventh of the RLA rests squarely on the fact that the RLA expressly preempts contrary state law;" the "NLRA, in contrast, contains no similar preemption of state law." Pet. App. 6a-7a, citing 795 F.2d at 1133. Indeed, "the NLRA expressly allows for contrary state law, see 29 U.S.C. § 164(b), and, therefore, does not authorize or provide for the deprivation of any right or privilege created by the government." Pet. App. 20a-21a n. 7.

The interpretation of *Hanson* by the courts below tracks this Court's explanation of *Hanson*'s state action ruling in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977):

> Unlike § 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), the Railway Labor Act preempts any attempt by a State to prohibit a union-shop agreement. Had it not been for that federal statute, the union-shop provision at issue in *Hanson* would have been invalidated under Nebraska law. The *Hanson* Court accordingly reasoned that government action was present. . . ." [*Id.* at 218 n. 12.]

See also Communications Workers v. Beck, *supra*, 487 U.S. at 761.[2]

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[2] The petitioners' understanding of *Hanson*, as resting on the union's status as exclusive bargaining representative, Pet. 15, would place *Hanson* squarely in conflict with *Steelworkers v. Weber*, 443

(c) The petitioners cite two court of appeals cases as conflicting with the Second Circuit's state action ruling—*Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970), and *Linscott v. Miller Falls Co.*, 440 F.2d 14 (1st Cir. 1971). Pet. 16. But *Seay* and *Linscott* were decided prior to *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974), which is the fount of this Court's current state action doctrine. And the other post-1974 court of appeals decision considering the state action question presented here in light of *Jackson* and *Lugar*, comes to the same conclusion as that reached by the Second Circuit, *viz.*, that under this Court's current framework for state action analysis private unions and private companies governed by the NLRA that negotiate union security agreements are not state actors. *See Kolinske v. Lubbers*, 412 F.2d 471, 474-480 (D.C. Cir. 1983).[3] Thus, there is no conflict with respect to the application of *Jackson* and *Lugar* to the state action question decided by the courts below.[4]

U.S. 193, 200 (1979). As the *Beck* opinion explains, *Weber* holds that the "negotiation of [a] collective bargaining agreement's affirmative-action plan does not involve state action." 487 U.S. at 761. In negotiating such a plan, the union acts "as the employee's exclusive representative," and thus, on petitioners' theory, both the collectively bargained plan and the union's administration of it would involve state action. Indeed, under the plaintiffs' state action theory every term of the collective bargaining agreement and every grievance resolution would be subject to constitutional scrutiny. *See also Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982).

[3] While *Kolinske* was decided before this Court's decision in *Beck*, constitutional claims identical to those raised by the petitioners in this case have been dismissed on state action grounds in the District of Columbia Circuit after *Beck*. *See Abrams v. Communications Workers*, 702 F. Supp. 920, 921-923, 925-926 (D.D.C. 1988), *aff'd mem.*, 884 F.2d 628 (D.C. Cir.), *cert. denied*, 110 S.Ct. 540 (1989); *Fitz v. Communications Workers*, 132 LRRM 2186, 2188 (D D.C. 1989), *aff'd mem.*, 917 F.2d 62 (1990), *cert. denied*, 111 S. Ct. 1582 (1991).

[4] As Judge Tamm explained in *Kolinske*, in *Hovan v. Carpenters*, 704 F.2d 641, 645 (1st Cir. 1983), the First Circuit has backed

2. After stripping the petitioners' complaint of its constitutional veneer, the courts below found that in implementing its post-*Beck* objection procedures, "the Union has not acted arbitrarily, discriminatorily or in bad faith," and on that basis concluded that the complaints' remaining fair representation claims lack merit. Pet. App. 22a. *See also* Pet. App. 8.

Beck holds that nonmembers required to pay agency fees as a condition of employment may state a claim against their union representative with respect to the union's handling of the nonmembers' objection to the uses and amount of their agency fee payments. *Communications Workers v. Beck, supra*, 466 U.S. at 743. "Under [the fair representation] doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Air Line Pilots Ass'n v. O'Neill*, —— U.S. ——, 111 S.Ct. 1127, 1134-35 (1991), quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Applying the teachings of the *Beck* opinion, the *O'Neill* Court held that this standard covers *all* fair representation claims:

> [W]e have . . . noted that the *Vaca v. Sipes* standard applies to "challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well." *Communications Workers v. Beck*, 487 U.S. 735, 743 (1988) (internal citation omitted). [111 S.Ct. at 1135 (citations omitted).]

As *O'Neill* demonstrates, the courts below were entirely correct to apply the *Vaca v. Sipes* standard in evaluating

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away from the state action analysis in *Linscott*, and the Ninth Circuit opinion in *Seay* offered no analysis of the state action question at all, simply assuming that *Hanson* was controlling. *Kolinske v. Lubbers, supra*, 471 F.2d at 480-481 n.9.

the petitioners' fair representation claim. Pet. App. 8a, 22a. And it is equally plain that the courts' application of the *Vaca v. Sipes* standard to the facts here is beyond criticism.

The petitioners maintain that the duty of fair representation requires that any union objection procedure meet three specific criteria. Pet. 17-18. First, the procedure may not be "a 'rebate scheme' under which the union was 'exacting and using full dues then refunding months later the portion that it was not allowed to exact in the first place.' ". Pet. 17 quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 443-444 (1984). Second, the procedure must " 'inform the employee of his rights and obligations' under a union-shop clause," and must provide fee payers with " 'sufficient information to gauge the propriety of the union's fee' so that they may decide whether to object or not." Pet. 17 quoting *Electrical Workers Local 801 v. NLRB*, 307 F.2d 679, 683 (D.C. Cir. 1962), and Pet. 18 quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986). Third, the procedure must " 'provide for a reasonably prompt decision by an impartial decision-maker' " of any objector's challenge to the amount his fee. Pet. 18 quoting *Hudson*, 475 U.S. at 307-308.

As the courts below found, the UAW's objection procedure meets all three of the criteria that the petitioners claim must be met under the duty of fair representation. Pet. App. 8a-11a, 22a-24a.

a. With respect to the petitioners' first criteria, the UAW's objection procedure is *not* a "rebate scheme." Pet. 17. The district court's findings—affirmed by the court of appeals, Pet. App. 8a—are dispositive of this issue:

> To the contrary, the Union has determined, at least preliminarily, the percentage of costs attributable to collective bargaining activities (85.4%) and adjusted plaintiffs' assessed fees accordingly. The Union has

> also placed a sum representing the entire projected 85.4% reduced payments of all non-Union plaintiffs for the twelve-month period following *Beck* in an interest bearing escrow account. These monies will not be used by the Union until an independent arbitrator has reviewed the Union's percentage determination. [Pet. App. 22a.]

b. With respect to the petitioners' second criteria, the Union's notice appended to the district court's opinion, Pet. App. 29a-33a, does " 'inform the employee of his rights and obligation' under a union-shop clause," Pet. 17. Further, the findings of the courts below, Pet. App. 8a-9a & 23a, establish that the Union did provide employees with sufficient information "so that they may decide whether to object or not," Pet. 18.

The UAW procedure provides all fee payers with notice that they have the option of objecting and paying a reduced fee based on the Union's collective bargaining expenditures. Pet. App. 21a-22a & 29a-30a. In addition, "each year, after a year-end audit, the Union will issue a Report of Expenditures Incurred in Providing Collective Bargaining Related Services (the 'Report') which will set forth the percentage of funds spent for chargeable and nonchargeable activities, as well as the major categories of expenditures and whether the Union denominates them as chargeable or non-chargeable to collective bargaining activities [, and] [t]his report will then be mailed to each nonmember who has filed an objection. . . ." Pet. App. 8a. *See also id.* at 23a.

The district court specifically found "the Report adequate for purposes of providing potential objectors an informed basis on which to object." Pet App. 25a. That finding is so well-grounded in the facts and law that on appeal the petitioners abandoned their contention that "the Union's annual expenditure Report is not sufficiently detailed to provide for an informed objection." Pet. App. 9a n. 5. Even so, the court of appeals endorsed the dis-

trict court's finding that the Report contained sufficient information. *Id.*

c. With respect to the petitioners' third criteria, every circuit to have ruled on the issue has held that the appointment of a fee arbitrator by the American Arbitration Association satisfies the First Amendment's requirement for an "impartial decisionmaker" in fee disputes. *See Ping v. Nat'l Education Ass'n*, 870 F.2d 1369, 1373 (7th Cir. 1989) (citing authority from other circuits). If this appointment process satisfies the First Amendment's strict standards, it necessarily falls within the "wide range of reasonableness" allowed by the duty of fair representation. *See Air Line Pilots Ass'n v. O'Neill*, *supra*, 111 S.Ct. at 1130.[5]

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[5] Misquoting the court of appeals, the petitioners assert, "The record here contains evidence demonstrating, as the court of appeals conceded, 'an appearance of bias arising out of the fact that union officials sat on the AAA board of directors, that respondent UAW's lawyers were involved in the drafting of the AAA agency fee arbitration rules, and that the list of possible arbitrators had been limited by the union's agreement with the AAA to arbitrators who are experienced in' labor relations." Pet. 26. What the court of appeals in fact said is the following: "Moreover, in *Andrews* we held that even where constitutional concerns were present, the mere appearance of bias arising out of the fact that union officials sat on the AAA board of directors, that union lawyers were involved in the drafting of the AAA agency fee arbitration rules, and that the list of possible arbitrators had been limited by the union's agreement with the AAA to arbitrators who are experienced in 'public-sector labor relations,' was not sufficient to render these procedures constitutionally suspect. *Andrews*, 829 F.2d at 341." Pet. App. 11a.

To make matters worse, the "record evidence" relied upon by the petitioners is from the record in *Andrews*, not from this case. In the summary judgment phase of the district court proceedings, the petitioners made an entirely abstract argument with respect to AAA's neutrality. Dist. Ct. Dk. Nr. 77. Eight months after the district court rendered the summary judgment decision at issue here, Dist. Ct. Dk. Nr. 82, the petitioners attempted to incorporate portions of the *Andrews* record in the record in this case, Dist. Ct. Dk. Nr. 95. As the *Andrews* court correctly held, even the evidence submitted in *that case* did not impeach AAA's neutrality. *Andrews v. Cheshire Education Ass'n*, 829 F.2d 335, 340-341 (2d Cir. 1987).

(d) Wholly apart from their three specific fair representation criteria, the petitioners contend that the Report reflects an inadequate fee calculation. Pet. 21-25. *See also* Pet. App. 9a. The petitioners raise two points in this regard: first, that the fee reduction is based on International Union expenditures, Pet. 21-22; and second, that, while the International Union expenditures are audited by a certified public accountant, the accountant does not further audit the allocation of these expenditures into the chargeable and nonchargeable categories, Pet. 22-25.

In support of these objections, petitioners rely entirely on public sector cases, which hold that, "because First Amendment rights are implicated, the method of calculating service fees for objecting employees adopted by the union must be narrowly drawn so as to minimize both the impingement upon the objectors' constitutional rights and the burden upon the exercise of those rights." *Damiano v. Matish*, 830 F.2d 1363, 1369 (6th Cir. 1987) (internal brackets, quotation marks and citations omitted). The petitioners agree that a strict standard should be applied to the method by which the Union sets the initial fee reduction, because "precision of regulation must be the touchstone in the First Amendment context." Pet. 22 (internal bracket, emphasis, quotation marks and citations omitted). As their basis for applying this First Amendment principle under the statutory duty of fair representation, the petitioners flatly assert, "[t]hat same precision is required by the duty of fair representation, ..." Pet. 22.[6]

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[6] The court of appeals noted that the UAW's method of allocating expenditures based on the audit of the Union's financial statements meets even the First Amendment standards applicable in the public sector as set out in *Andrews v. Cheshire Education Ass'n*, 829 F.2d 335 (2d Cir. 1987). Pet. App. 9a-10a. Other Circuits have followed *Andrews* in this regard. *See Dashiell v. Montgomery County, MD*, 925 F.2d 750, 754-755 (4th Cir. 1991) (discussing the circuit court precedents). In addition, citing with approval the trial court opinion

But this Court's precedents establish in no uncertain terms that the statutory duty of a private sector labor organization to fairly represent the employees in its bargaining unit is *not* equivalent to the government's First Amendment duty to avoid infringing freedom of speech. The duty of fair representation allows unions a "wide range of reasonableness." *Air Line Pilots Ass'n v. O'Neill*, *supra*, 111 S.Ct. at 1130, quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). As the Court explained in *Steelworkers v. Sadlowski*, *supra*, a statutory requirement that union actions be "reasonable" is not equivalent to "the stringent tests applied in the First Amendment context." 457 U.S. at 111. Against this background, the courts below clearly applied the correct standard in reviewing the Union's initial fee reduction.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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in *Andrews*, the court of appeals found that the UAW's use of International Union expenditures to calculate the initial fee reduction was reasonable, because if a fee payer challenged the calculation, "the Union bears the burden of proving that the local union's expenditures are chargeable to the degree asserted by the Union." Pet. App. 10a.